SUPREME COURT, U. S.
FILED
JUL 10 1961
JAMES R. BROWNING, Clerk

No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

ALLIED RESERVE LIFE INSURANCE COMPANY, *Petitioner*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through Hubert Morgan Cragg, his Father and Next Friend, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

LAIDLER B. MACKALL
1100 Shoreham Building
Washington 5, D. C.

HARRY F. THORNBERRY
P. O. Box 6166
Dallas, Texas

CHARLES C. BAKER
ABERNATHY & BAKER
Shawnee, Oklahoma

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Supreme Court of the State of Oklahoma.

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma is reported at 360 P.2d 707. As reported there it does not show the material deleted from the original opinion by a subsequent order. This material

is enclosed in brackets in the opinion as reprinted in the Appendix hereto (App. 5a). There was no opinion in the trial court.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered June 21, 1960 (App. 5a).

A first petition for rehearing was timely filed. The original opinion was modified by order dated September 19, 1960 (App. 12a), and on September 21, 1960, the first petition for rehearing was denied (App. 13a) without opinion.

Petitioner obtained an extension of time to file an application for leave to file a second petition for rehearing (App. 13a), and, on October 11, 1960, within the extension granted, filed such an application. It was denied without opinion on April 11, 1961 (App. 13a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) because a right is specially claimed under the Constitution of the United States.

QUESTION PRESENTED

In this case the Supreme Court of the State of Oklahoma held that the statute on which petitioner's defense depended was not in effect; after this error had been pointed out on rehearing, the court deleted the erroneous reference to the statute from its opinion but persisted in ignoring the statute; thereafter the court held the application for another review for a period of six months before denying it, thus threatening petitioner's right to obtain review by this Court. Do not these circumstances present an example of judicial action so arbitrary as to be "impossible in a rational

administration of justice" and, for this reason, a denial of petitioner's right to due process of law?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part that no State shall "deprive any person of life, liberty, or property, without due process of law."

Of importance to this case also are Rules 29(1) and 33(1) of the Rules of the Supreme Court of the State of Oklahoma, Title 15, Okla. Stats. Ann., Ch. 15 App., Rules 29(1) and 33(1). These rules provide, respectively, for the filing of an application for a second petition for rehearing and a stay of mandate until such an application is disposed of. The rules are reprinted in the Appendix hereto (App. 1a).

The three statutes at issue in the court below are also reprinted in the Appendix (App. 2a). That court relied on 36 Okla. Stats. 1951, Sections 213 and 820 and ignored 36 Okla. Stats. 1957, Section 4407(c).

Also reprinted in the Appendix are 28 U.S.C. § 1257(3) and 28 U.S.C. § 2101(c) which have a bearing on this case (App. 3a).

STATEMENT

This case presents a shocking example of arbitrary exercise of judicial power. The story is simple.

It begins as an action by respondent to recover benefits under policies of medical-surgical and hospital-surgical insurance issued by petitioner, an insurance company. The applications for this insurance signed by respondent represented that he had not received

medical treatment in the past three years. Actually, as respondent admitted at the trial, he had during that period been hospitalized under medical care at different times for head injuries (R. 73-74), glandular disorders (R. 75) and injection of a drug (R. 75-76). Petitioner established that respondent's representations were material to its decision to issue the policies and that it would not have issued them under any circumstances if it had known respondent's true health record (R. 252-253).

The core issue of the case then became whether petitioner's defense was established by these facts or whether petitioner was further required to show fraudulent intent on the part of respondent. Petitioner relied primarily on 36 Okla. Stats. 1957, Sec. 4407(c), (App. 2a), *a statute which had been enacted in 1955 and was in effect on November 1, 1956, the date the policies were issued.* In its instructions, the trial court did not give effect to this statute, and a jury verdict against petitioner was recovered.

On appeal, the Supreme Court of the State of Oklahoma affirmed on the ground that Oklahoma statutes required a showing of fraudulent intent to make out a defense under the policies. It held that Section 4407(c) was not applicable because it was "not in force at the time the insurance contracts (policies) were (issued) made." (App. 9a)

Petitioner promptly filed a petition for rehearing calling attention to this error.

The Supreme Court of the State of Oklahoma, incredible as it may seem, responded by deleting from its opinion the principal reference to Section 4407(c) (App. 9a, 12a). The court neglected, however, to

delete an earlier reference to the statute (App. 7a) and to change the plural form "subsequently enacted statutes" in the last paragraph of its opinion (App. 11a). Only these telltale evidences remain within the opinion to show what actually happened. Two days after its order of deletion, the Supreme Court of the State of Oklahoma denied the petition for rehearing without opinion (App. 13a).

How the Federal Question Was Presented:

Petitioner obtained an extension of time to file an application for a second petition for rehearing (App. 13a) and within the extended time filed such an application. This procedure is provided for in Oklahoma by Rule 29(1) of the Rules of the Supreme Court of the State of Oklahoma which states that such an application "may be made but not filed except by leave of Court." (App. 1a) Thus, acceptance of the filing in this case required leave of the Supreme Court of the State of Oklahoma.

In its second petition for rehearing, petitioner raised the point that the opinion of the court below as corrected by its order of deletion, September 19, 1960, "constitutes a violation of the Constitution of the United States and a denial of due process of law under the Fourteenth Amendment thereto" (App. 4a) because it showed a deliberate and arbitrary disregard of a controlling legislative enactment. The same point was treated at several different places in the supporting brief.

When the Supreme Court of the State of Oklahoma, by its own leave, accepted the filing of the application for a second petition for rehearing, the mandate in this case could not issue "until the application . . . [was]

disposed of." Rules of the Supreme Court of the State of Oklahoma, Rule 33(1), (App. 1a). With the mandate thus stayed and the application pending in the court below, finality of the state court's judgment was effectively suspended.

With the case in this posture, the Supreme Court of the State of Oklahoma held petitioner's application from October 11, 1960, to April 11, 1961, a period of exactly six months, before denying it without opinion (App. 13a).

Under 28 U.S.C. § 1257(3), petitioner has a statutory right to seek review in this Court of the judgment of the court below. The time limits for review by certiorari, however, are jurisdictional, and if petitioner's time to apply for certiorari were to run from the denial of the first petition for rehearing in this case, the time would have expired on December 20, 1960. With the maximum possible extension, time would have elapsed on February 18, 1961. Thus, if the time were to run from denial of the first petition for rehearing in this case, the action of the Supreme Court of the State of Oklahoma in holding petitioner's application for a period of six months would have effectively precluded petitioner from its statutory right to seek review of the state judgment in this Court.

REASONS FOR GRANTING THE WRIT

The Circumstances of This Case Have Given Rise to a Basic and Important Question Under the Due Process Clause of the Fourteenth Amendment. The Question Was Decided Here by the Supreme Court of the State of Oklahoma, But It Has Not Heretofore Been Determined By This Court

Petitioner is well aware of the formidable burden it assumes in seeking review of a state court judgment for denial of due process. But the due process clause does impose limits on what a state court may do. In a case where those limits have been exceeded, review by this Court is appropriate. Petitioner feels very strongly that this is such a case.

This case involves a denial of due process, not because it is wrong—which it is—but because the state court's disregard of an applicable statute is so flagrant that it stands out like a red flag. That same red flag was waved violently at petitioner's attempts to secure rehearing below.

The essential importance of this case is that it draws into question a principle that is one of the bedrock foundations of Law: that a court must recognize a valid legislative enactment which applies to the determination to be made. To disregard this principle is to nullify legislative power, to create confusion among those who must rely on the law as written and to reduce to shambles the orderly process of adjudication based on reason.

1. In a rational system of justice, it would be impossible to disregard the statute on which petitioner relies.

There is here only very superficially a question of "statutory construction." Actually, the applicability of 36 Okla. Stats. 1957, Sec. 4407(c), the statute on

which petitioner relies, is apparent on the face of the statute itself; its applicability becomes absolutely certain upon closer examination.

For many years prior to 1955 the Oklahoma statutes did require a showing of fraud or intent to deceive on the part of an applicant for insurance in order for the insurance company to defend on the ground of misrepresentations in the application. This rule was changed in 1955 by the enactment of Sec. 4407(c) which provided for a defense based solely on a false statement which materially affected acceptance of the risk by the insurance company.

Section 4407(c) is plainly inconsistent with 36 Okla. Stats. 1951, Secs. 213 and 820, the older statutes relied on by respondent and by the court below. If the court below were to "construe" these statutes together, it would have to give paramount and controlling effect to Sec. 4407(c) as the most recent act of the legislature which had repealed by implication earlier acts on the same subject matter, 1 Sutherland, Statutory Construction, § 2012 (3rd ed. 1943).

It is, of course, not the function of this Court to interpret Oklahoma statutes. But, on the other hand, it is the function of this Court to measure state court proceedings by the standard of due process, and a violation of due process is "none the less clear when the result is accomplished by the state judiciary." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1930). Although the Supreme Court of the State of Oklahoma did have the power to construe Sec. 4407(c), it had no power to nullify it by mis-dating its enactment. "A statute in force when a contract was made cannot be made a subsequent statute through

new interpretation by the courts." *Fleming* v. *Fleming*, 264 U.S. 29, 32 (1924).

It is even more obvious that the Supreme Court of the State of Oklahoma had no power to nullify Sec. 4407(e) by ignoring it completely. It was the duty of that court to construe the statute and not to ignore its plain meaning and relevance. *Field* v. *Seabury*, 19 How. 323, 330-31 (1857). That duty was so clear in this case that to ignore it would have been "impossible in a rational administration of justice," *Chicago L. Ins. Co.* v. *Cherry*, 244 U.S. 25, 30 (1917), and for that reason the action of the court below involved a denial of petitioner's right to due process of law.

2. Action of the court below in deleting reference to the statute petitioner relied on establishes the inference that its ruling was arbitrary.

If the court below had mistakenly held that the statute petitioner relies on was not in effect at the time the policy was issued, or if it could have overlooked the statute, either of these, without more, would not furnish a basis for review by this Court. But it is apparent that in this case the court below did much more. When the basis it had given for not applying the statute was refuted, it simply eliminated the discredited reference.

This was not haphazard error. It was an action taken deliberately by an order entered 66 days after the issue had been presented in petitioner's petition for rehearing. This action nullified Sec. 4407(e) as effectively as if it had been stricken from the statute books. More than that, this action was so completely at odds with accepted judicial procedure that it disclosed to petitioner for the first time that the court's original ruling was arbitrary.

In *Endicott-Johnson Corp.* v. *Encyclopedia Press*, 266 U.S. 285, 288 (1924), this Court defined a judicial proceeding which conforms to due process as "a proceeding which, observing the general rules thus established, follows forms of law appropriate to the case and just to the parties to be affected." It is clear that this standard would not be met by a court which refused to apply statutes enacted by the legislature in odd numbered years or statutes which, if applied, would benefit insurance companies. In these instances, the rulings would be neither appropriate nor just, and they would be clearly arbitrary. Is it any less arbitrary for a court to refuse to apply a statute by the device of ignoring it completely? In the present case the arbitrary basis of the court's decision is shown by its order of deletion as surely as it would have been by assigning one of the reasons in the examples just mentioned.

The order of deletion after the first petition for rehearing had one additional effect. It meant that petitioner was given notice at this point, *for the first time*, that a question of denial of due process was present in the case. Petitioner promptly raised this substantial Federal question in its application for a second petition for rehearing. This Court has recognized that a Federal question may be timely raised if raised at the first opportunity, even if that opportunity occurs first in an application for a second rehearing. *Fleming* v. *Fleming*, 264 U.S. 29, 31 (1924).

3. Action of the court below in holding petitioner's application for second rehearing for a period of six months confirms the fact that its prior rulings were an abuse of judicial power, and in addition such delay threatened the jurisdiction of this Court in that it impinged unfairly upon petitioner's right to seek review in this Court.

Petitioner's application for a second rehearing was filed by leave of the Supreme Court of the State of Oklahoma. The pendency of this application in the court below stayed the mandate in this case and effectively suspended the finality of the judgment below.

Finality, of course, is a requirement for review by this Court. The test for finality has been defined as "whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

With petitioner's application pending on the docket of the Supreme Court of the State of Oklahoma, it is apparent that the adjudication was subject to further review and modification or reversal by that state court. This is particularly true in the light of the serious question raised in the application and the extraordinary length of time that it was under consideration.

Under these circumstances, it is only reasonable to assume that this Court would not have reviewed the case because the judgment would not be considered final. This Court is not permitted to render advisory opinions, and it has stated that "if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945). Until the

Supreme Court of the State of Oklahoma had disposed of petitioner's application for a second rehearing, that court could have taken any action to render either the same or an entirely different judgment. Thus, it could not be expected that petitioner would seek or that this Court would grant a writ of certiorari during the period that the court below held petitioner's application.

The lack of finality of the court's judgment and the long delay in acting on the second petition for rehearing posed for petitioner a real dilemma. This Court has held that the time within which a petition for certiorari must be filed runs from the lower court's disposition of the first petition for rehearing rather than its disposition of the second. *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498 (1927). If that rule were to be applied in this case, the action of the Supreme Court of Oklahoma in holding petitioner's application for six months would have effectively precluded petitioner's exercise of its valuable Federal statutory right to seek review of this Court on certiorari. Under 28 U.S.C. § 2101(c) a petition for certiorari must be filed within 90 days of entry of the judgment below, and this period may be extended only for an additional 60 days. If petitioner's time were to be computed from the denial of its first petition for rehearing on September 21, 1960, it would have expired on December 20, 1960, and the longest possible extension that it could have obtained would have expired on February 18, 1961. Since the court below did not dispose of petitioner's application until April 11, 1961, and the judgment did not effectively become final until such disposition, petitioner's right to seek certiorari would have been completely foreclosed under the *Gypsy Oil Co.* case.

But it is apparent that *Gypsy Oil Co.* cannot apply in the circumstances of this case. The reason is simple but conclusive. In *Gypsy Oil Co.*, even though time ran from the denial of the first petition for rehearing, the petitioner still had more than a month remaining after disposition of the second petition for rehearing in which to apply to this Court for certiorari or an extension of time. Not so here. In the present case, if *Gypsy Oil Co.* were to be applied, petitioner's valuable right to apply for certiorari would have expired long before his earliest possible opportunity to exercise it. This would result in the clear deprivation of the right accorded petitioner by a Federal statute.

This is not to say, however, that the long delayed action of the court below is without further significance. Coupled with its action in deleting reference to the statute petitioner relied on and the apparent applicability of the *Gypsy Oil Co.* case, it demonstrates that in this case there was an abuse of judicial power amounting to a denial of due process of law.

CONCLUSION

This petition for a writ of certiorari should be granted.

LAIDLER B. MACKALL
HARRY F. THORNBERRY
CHARLES C. BAKER
Attorneys for Petitioner

APPENDIX

Rule 29(1), Rules of the Supreme Court of the State of Oklahoma, Title 15, Okla. Stats. Ann., Ch. 15 App., Rule 29(1)

APPLICATION FOR SECOND PETITION FOR REHEARING: (1) Within five (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and a brief in support thereof.

Rule 33(1), Rules of the Supreme Court of the State of Oklahoma, Title 15, Okla. Stats. Ann., Ch. 15 App., Rule 33(1)

MANDATE AND ISSUANCE: (1) After the expiration of fifteen (15) days from the filing of an opinion proper mandate to the trial court may issue; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied, the mandate shall not be issued and transmitted until the expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of.

36 Okla. Stats. 1951, Sec. 213

"Sec. 213. *Statements in Application Deemed Representations and Not Warranties—Exceptions—Application Not Part of Policy Unless Attached.* In any claim arising under a policy which has been issued in this State by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, however, that the company shall not be debarred from proving as a defense to such claim that said statements are wilfully false, fraudulent or misleading. • • • "

36 Okla. Stats. 1951, Sec. 820

"The falsity of any statement in the application for any policy covered by this act shall not bar the right to recover thereunder unless such false statement *was made with actual intent to deceive and unless it* materially affected either the acceptance of the risk or the hazard assumed by the insurer."

36 Okla. Stats. 1957, Sec. 4407(c); formerly 36 Okla. Stats. 1955, Sec. 833.5

"The falsity of any statement in the application for any policy covered by this article may not bar the right to recover thereunder unless such false statement materially affected either acceptance of the risk or the hazard assumed by the insurer."

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2101(c)

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Portion of Record Necessary to Show Proper and Timely Raising of Federal Question: Paragraph Numbered 5, Petitioner's Second Petition for Rehearing, Filed in the Court Below, October 11, 1960

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 38,731

ALLIED RESERVE LIFE INSURANCE COMPANY, a corporation, *Plaintiff in Error,*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through HUBERT MORGAN CRAGG, his Father and Next Friend, *Defendant in Error.*

* * *

5. That the opinion rendered herein, as corrected by order of this Court on September 19, 1960, constitutes a violation of the Constitution of the United States and a denial of due process of law under the Fourteenth Amendment thereto, as follows:

(a) That an Appellate Court in order to satisfy the requirements of due process of law must construe and apply *all* statutory provisions applicable to the controversy and cannot rely upon only a part and disregard the remainder where all such statutes have been called to the attention of the Court in the Briefs of the parties.

Opinion and Judgment of the Supreme Court of the State of Oklahoma, June 21, 1960. (Deleted words in brackets; inserted word underlined.)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 38,731

ALLIED RESERVE LIFE INSURANCE COMPANY, a corporation, *Plaintiff in Error,*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through HUBERT MORGAN CRAGG, his Father and Next Friend, *Defendant in Error.*

SYLLABUS

1. The existing statutes and the settled case-law of this state at the time a contract (policy or insurance) is made (issued) become a part of such contract (or policy) and must be read into such contract or policy.

2. Under Sections 213 and 820, 36 O. S. 1951, to avoid a policy for misrepresentation, the false statement must have been made wilfully and with intent to deceive, and must have been relied on by the insurer.

3. Record examined and held, that the instructions as a whole fairly submitted the issues of law and fact to the jury, and that the verdict and judgment based thereon is reasonably sustained by the evidence and is not contrary to law.

APPEAL FROM THE COURT OF COMMON PLEAS OF TULSA COUNTY, OKLAHOMA

Hon. Paul A. Walker, Judge

Action to recover medical, surgical and hospital expenses under insurance policies. Judgment for plaintiff. Defendant appeals.

AFFIRMED

Abernathy & Abernathy, Charles C. Baker,
Shawnee, Oklahoma.
For Plaintiff in Error.

John A. Ladner, Jr., Fred Woodson,
Tulsa, Oklahoma.
For Defendant in Error.

JOHNSON, J.:

This action was brought in the Court of Common Pleas of Tulsa County, Oklahoma, by Hubert Morgan Cragg, Jr., a minor, through Hubert Morgan Cragg, Sr., his father and next friend, against Allied Reserve Life Insurance Company of Oklahoma City, Oklahoma, to recover certain medical, surgical and hospital benefits under two policies of insurance issued by the defendant to the plaintiff on November 1, 1956, bearing policy number S-O-42-67. Plaintiff asked for $2,599.00 but reduced that sum by stipulation to $1,216.50. This was the amount of expenses allegedly accrued as a result of confinement at Hillcrest Medical Center in Tulsa, Oklahoma, which expenses arose out of an alleged accidental injury sustained by plaintiff on or about December 12, 1956. A jury trial resulted in a verdict and judgment in favor of plaintiff in the amount of $1,216.50, with eleven jurors concurring in the verdict.

Motion for a new trial was overruled, and exceptions allowed, resulting in this appeal.

For reversal the defendant's sole contention is that the trial court committed error in refusing to give its requested instruction no. 9 and in giving instruction no. 6.

The defendant argues that instruction no. 6 erroneously instructed the jury that misrepresentations, omissions, or concealment of facts by plaintiff on his written application would not defeat recovery on the policies unless such statements were fraudulent, especially since defendant (did not raise and) was not relying on the defense of fraud, but in line with its pleaded defense it was relying upon Secs. 3609 and 4407(c), Oklahoma Insurance Code, Title 36, O. S. 1951, as they appear in the Laws of 1957, page 365. That is, the sole defense alleged and proved was that the misrepresentations and concealments of fact by plaintiff on his written applications were material to the acceptance of the risk and hazard assumed, and that the company would not have issued the policies had the true health history of the plaintiff been disclosed on the written applications.

The plaintiff's counter proposition is that the trial court did not commit error in refusing to give the jury defendant's requested instruction no. 9, and that instruction no. 6 given by the trial court correctly and fairly presented the law of the case under the evidence.

Plaintiff concedes that under the general rule it was the duty of the trial court to submit by appropriate instructions the theory of the defense in accordance with the law and evidence where the evidence tends to support the same. Western States Grocery Co. v. Mirt, 190 Okl. 299, 123 P. 2d 286. But plaintiff points to the facts in this case and the law governing the contracts of insurance as they existed at the time the insurance policies were issued, and asserts that by reason thereof the court's instruction no. 6 was a correct statement of the law as (then) applied to the facts.

The record discloses that the applications for insurance policies were made on October 30, 1956, and that the policies became effective and were issued on November 1, 1956; that the defendant breached the conditions of the policies by refusing to pay plaintiff's medical expenses during December, 1956 and January, 1957.

Defendant's appeal presents the single question of whether the intent to deceive by the insured plaintiff is a necessary element of defendant's defense. The statutes in force and effect and the case law existing in November, 1956, when the insurance policies were issued, determine and control that question. Oklahoma Cotton Growers' Ass'n. v. Salyer, 114 Okl. 77, 243 P. 232. Therein in the first paragraph of the syllabus this Court said:

> "The existing statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it.
>
> "All contracts are formed to be construed in the light of the rules and principles of law applicable to the subject-matter of the transaction, and those rules and principles control the rights of the parties; the laws upon the subject of a contract are read into it and become a part thereof to the same extent as though they were written into its terms.
>
> "Where parties enter into a contract by virtue of authority derived from a certain act, and, in view of such rights as are created, defined and conferred by such act, it is elemental that the rights of the parties must be construed by the provisions of the act.
>
> "Where a contract is entered into under such provisions and conditions, and such contract is alleged to have been breached while such act is still in force, then, if any provision or terms contained in such contract, in violation of rights conferred by such act, which are remedied by a subsequent act, such subse-

quent act is void as to such provisions, and violative of section 15, art. 2 (Bill of Rights), of the Constitution, as tending to violate the obligation of contracts."

Section[s] 3609 [and 4407 (c)] 36 O. S. 1957, became effective on July 1, 1957, and [were] was not in force at the time the insurance contracts (policies) were (issued) made. The corresponding former section was 36 O. S. 1951, Sec. 213, and was in force at the time of the issuance of the insurance policies herein, and in part (pertinent to the issues herein) provided:

"Sec. 213. Statements in Application Deemed Representations and Not Warranties Exceptions Application Not Part of Policy Unless Attached. In any claim arising under a policy which has been issued in this State by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, However, that the company shall not be debarred from proving as a defense to such claim that said statements are wilfully false, fraudulent or misleading: * * *"

And in considering Section 213, supra, we must also consider in connection therewith 36 O. S. 1951, Sec. 820 (Riley v. Cordell, 200 Okl. 390, 194 P. 2d 857), which statute applied to the contracts herein and provided:

"Sec. 820. Statements in Application. The falsity of any statement in the application for any policy covered by this Act shall not bar the right to recover thereunder unless such false statement was made with actual intent to deceive and unless it materially affected

either the acceptance of the risk or the hazard assumed by the insurer. [Laws 1947, p. 284, Sec. 20]."

Thus the law as reflected by these statutes (Secs. 213 and 820, supra) clearly required proof of actual intent to deceive, or deceit or fraud to avoid recovery under the insurance policies. There was no such showing in the instant case. In Continental Casualty Co. v. Owen, 38 Okl. 107, 131 P. 1084, this court said:

"* * * Indeed, it may be said that it is well settled that to avoid a policy for misrepresentation, the false statement must have been made wilfully and with intent to deceive, and must have been relied on by the insurer. * * *"

There are other Oklahoma cases holding that under the law as it existed at the time the policies herein were issued that representations made by the insured must be proved to be wilfully false, fraudulent, misleading and with intent to deceive to enable the insurer to avoid the insurance contract. New York Life Ins. Co. v. Stagg, 95 Okl. 252, 219 P. 362; Lincoln Health & Accident Ins. Co. v. Coslow, 158 Okl. 169, 12 P. 2d 875, and Atlas Life Ins. Co. v. Eastman, (Okl.) 320 P. 2d 397, and cited cases.

Instruction no. 6 reads as follows:

"INSTRUCTION No. 6

"You are instructed that all statements and descriptions in any application for an insurance policy or in negotiations therefor by and in behalf of the insured shall be deemed to be representations and not warranties. In this connection, a representation is any direct and positive affirmation of a matter of fact as distinguished from a mere matter of opinion or judgment, made by the insured or in his behalf and designed to induce the action of the insurer and actually relied upon by the insurer in issuing the policy.

"Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery

under the policy unless the statements are fraudulent. In this connection, in order that you find by a preponderance of the evidence that the statement was fraudulent, you must find that plaintiff made a material misrepresentation or omitted or concealed material facts, that it was false or the omission was meant to conceal, that when plaintiff made it, he knew it was false or meant to conceal or made it recklessly, that plaintiff made it or omitted it was the intention that it be acted upon by the defendant, that the defendant acted in reliance thereon, and that the defendant in good faith would not have issued the policy if the true facts had been known to the defendant.

"D excepts and allowed.

"(s) Paul A. Walker, Jr."

Thus the trial court's instruction No. 6 setting for the requirement of proof of fraud or intent to deceive in statements made to avoid the policy correctly stated the law applicable in such cases as it existed when the policies were issued, and the refusal to give defendant's requested instructions and the giving of instruction no. 6 was not error, as the instructions when considered as a whole fairly stated the issues to the jury.

The defendant cites a number of cases from other jurisdictions tending to support their theory as applied to the statutes as they now exist, but we decline to pass upon the subsequently enacted statutes and hold without discussion that the contention of defendant that the law in this case is one of procedure rather than substantive is without merit.

The judgment is affirmed.

CONCUR: Williams, V.C.J., and Halley, Blackbird, Irwin & Berry, JJ.

CONCUR IN RESULT: Jackson, J.

DISSENT: Davison, C.J. and Wolch, J.

Order of the Supreme Court of the State of Oklahoma Correcting Its Opinion, September 19, 1960

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 38,731

ALLIED RESERVE LIFE INSURANCE COMPANY, a corporation, *Plaintiff in Error,*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through HUBERT MORGAN CRAGG, his Father and Next Friend, *Defendant in Error.*

ORDER

IT IS HEREBY ORDERED THAT the opinion in the above styled cause be corrected in the following manner:

The first sentence in paragraph two on page four of the opinion should be changed to read as follows: "Section 3609, 36 O.S. 1957, became effective on July 1, 1957, and was not in force at the time the insurance contracts (policies) were (issued) made."

In paragraph 5 of page 4, after the quoting of Sec. 820, the following should be deleted: "Laws 1947, p. 284, Sec. 20."

DONE BY ORDER OF THE COURT IN CONFERENCE this 19th day of September, 1960.

/s/ BEN T. WILLIAMS
Acting Chief Justice

Order of the Supreme Court of Oklahoma Denying Petition for Rehearing, September 21, 1960

38731—Allied Reserve Life Ins. Co. v. Hubert Morgan Cragg, Jr., etc. Petition for rehearing denied.

Order of the Supreme Court of the State of Oklahoma Granting Extension of Time to File Application for Leave to File Second Petition for Rehearing, September 27, 1960

38731—Allied Reserve Life Ins. Co. v. Hubert Morgan Cragg, Jr., etc. Plaintiff granted until Oct. 12, 1960, to file application for leave to file second petition for rehearing.

Order of the Supreme Court of the State of Oklahoma Denying Application for Leave to File Second Petition for Rehearing, April 11, 1961

38731—Allied Reserve Life Ins. Co. v. Hubert Morgan Cragg, Jr., etc. Application for leave to file 2nd petition for rehearing denied.